



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-92-18

### FACTS:

The ABC County Retirement Board (Board) administers the public contributory retirement system for the employees of dozens of towns and districts, and the County of ABC. The Board is required to administer the retirement funds of its members, to invest the funds, and to service the members of the system in related retirement matters. Members of the Board are required to invest funds, interview investment managers, evaluate investment proposals, make investment choices, and regulate and review investment conduct on behalf of the Retirement System.

An elected member of the Board is a municipal employee from one of the County towns who is currently on leave of absence from that Town. He intends to retire as a municipal employee at the conclusion of his leave of absence. He has begun employment with a private sector investment firm (Firm) which is involved in the public pension market. This private employment involves the marketing, sales, and promotion of his employer's pension products and will require discussion, advisement and personal appearances before public retirement boards regarding his employer's services. According to the elected member, this firm is not presently involved with any investment activity concerning Board funds and no future investment activity is contemplated.

### QUESTION:

May the elected Board member remain a Board member and continue private employment with an investment firm?

### ANSWER:

G.L. c. 268A will permit the elected Board Member to remain a Board member and hold private employment with the Firm, but he will be subject to the following restrictions.

### DISCUSSION:

For purposes of the G.L. c. 268A, the elected member is a special county employee,<sup>1/</sup> as Board members serve without compensation. See, G.L. c. 32, §20(3)(c). Four sections of the law are relevant.

#### 1. Section 11

G. L. c. 268A, §11 provides, in pertinent part, that a special county employee may not receive compensation from or act as the agent for anyone, other than the county, in connection with any particular matter<sup>2/</sup> in which the county is a party or has a direct and substantial interest and in which he has at any time participated as a county employee, or which is or within one year has been the subject of his official responsibility, or which is pending in the agency in which he is serving. For example, the elected member may not receive compensation from the Firm for preparing proposals which the Firm will submit to the Board. *EC-COI-91-13*. In addition, he may not represent the Firm in any dealings before the Board nor solicit any Firm business from the Board. See *EC-COI-85-60*; *83-150*. Similarly, he may not receive compensation from the Firm or act as the Firm's agent in connection with soliciting business from municipalities in the County who are not members of the County Retirement System or who are members but may choose to leave. For example, if a municipality has notified the Board of a decision to leave the County system, the elected member will be prohibited from receiving compensation from the Firm or acting as the Firm's agent in any request for proposal or presentation to the municipality in order to gain the management business which the County has lost. The County has a direct and substantial interest in a municipal

decision to use the Firm as an investment manager, rather than to join the County system. We note that we have previously concluded that “the distinguishing factor of acting as agent within the meaning of the conflict law is ‘acting on behalf of’ some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications.” *In re Reynolds*, 1989 SEC 423, 427. *See Commonwealth v. Newman*, 32 Mass. App.Ct. 148, 150 (1992). It does not appear that issues will arise under §11 as long as the Member does not do business with any town in ABC County system or any business which implicates County retirement funds, or any business with municipal pension systems which are competitors of the County system.<sup>3/</sup>

## **2. Section 13**

Section 13 provides that no county employee may participate as such an employee in any particular matter in which, to his knowledge, a business organization in which he is serving as an officer, director, trustee, partner, or employee has a financial interest. The definition of participation includes participating in the formulation of a matter for a vote, as well as voting on the matter. *Graham v. McGrail*, 370 Mass. 133, 138 (1978). Section 13 encompasses any financial interest without regard to the size of said interest, but the financial interest must be direct and immediate or reasonably foreseeable. *See EC-COI-89-19; 89-8; 86-26* (city councillor required to abstain from participating in school committee appointment as committee reviewing specific provisions that may affect councillor’s employer). Financial interests which are remote, speculative or not sufficiently identifiable do not require disqualification under G.L. c. 268A. *See EC-COI-84-96; 87-16*. As the Firm is not involved with any investment activity involving any County Retirement funds and does not contemplate such activity in the future the elected member will not be required to abstain in Board investment matters. *See EC-COI-85-60* (County Commissioner required to abstain in any matters affecting municipalities which were his business clients and proposals submitted by private firm employing him); *83-150* (County Commissioner required to abstain in matters involving future insurance contracts on which Commissioner intended to bid as private insurance broker). However, the elected member will be required to abstain in any decisions, determinations or other matters concerning whether a municipality may join or leave the County system if said municipality has a prospective business arrangement with the Firm when it leaves the County system, or if the municipality has a present relationship with the Firm which will terminate upon entering the County system. In this respect, the Firm is a competitor to the County in the field of municipal pension management, and has a reasonably foreseeable financial interest in a Board decision to admit or terminate a municipal member of the system. *See EC-COI-86-13*.

## **3. Section 23**

Section 23 contains general standards of conduct which are applicable to all public employees. It provides, in pertinent part, that no employee may use or attempt to use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. G.L. c. 268A, §23(b)(2). Section 23(b)(2) will prohibit the Board member from using county resources, such as staff, equipment, or county time or his county title in order to further his private business activities. *See, Public Enforcement Letter 89-4* (state employee’s use of official stationery and state resources in attempt to promote private trip from which employee would benefit was unwarranted use of official position); *in re Buckley*, 1983 SEC 157 (municipal housing authority employee who was also private landlord violated §23(b)(2) by using official agency stationery to communicate with private tenants); *EC-COI-86-13; 85-28*. This section would also prohibit the Board member from soliciting Firm business from the various public entities whose funds comprise the Retirement system. In past precedent the State Ethics Commission has held that public employees are prohibited from privately soliciting private business from those whom they oversee. *See EC-COI-92-7; 82-124* (county commissioner could not solicit private insurance business from county vendors); *84-61* (legislator could not market tax shelters to persons with interest in legislative business); *in re Burke*, 1985 SEC 248 (fining official for using official position to obtain access for private purposes to persons his agency regulated).

Further, §23 (b)(3) prohibits a county employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, or position of anyone. For example, issues under this section will arise if the Board member is required to make an investment decision affecting an investment firm which is currently competing with his firm for a non-County contract. In order to dispel the appearance of a conflict of interest, this section requires that an elected official disclose all of the relevant factors pertaining to the perceived conflict in a public manner prior to participating in a particular matter. This disclosure should be filed, in writing, in the County Clerk’s or County Administrator’s office. *EC-COI-90-2; 89-19*.

Additionally, §23(c) prohibits the Board member from disclosing confidential information which he has acquired in his public position or from engaging in professional activities which would require the disclosure of such information. *See EC-COI-84-26; 83-154*. The Commission has previously defined “confidential information” as information that is unavailable to the general public, as distinguished from information that, although not well known, is a matter of public record. *EC-COI-89-7*.

#### **4. Section 12**

When the Board member retires or resigns from the Board, he will be subject to the restrictions of §12, which governs the activities of former county employees. In general, he will be prohibited from receiving compensation from or acting as the agent for someone, other than the County, in connection with a matter in which the County is a party or has a direct and substantial interest and in which he had participated as a County employee. He will also be prohibited from personally appearing, before a County agency, on behalf of someone other than the County in connection with a matter which was under his official responsibility in the two years prior to his termination of County service.<sup>4/</sup>

**Date Authorized: June 16, 1992**

<sup>1/</sup>“Special county employee,” a county employee who is performing services or holding an office, position, employment or membership for which no compensation is provided; or who is not an elected official and (1) occupies a position which, by its classification in the county agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the State Ethics Commission and the office of the county commissioners prior to the commencement of any personal or private employment, or (2) in fact does not earn compensation as a county employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the law shall be considered an equivalent to compensation for seven hours per day. A special county employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(m).

<sup>2/</sup>“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>3/</sup>If these facts change, the elected member should seek further guidance from the State Ethics Commission.

<sup>4/</sup>The Board member should seek further guidance from this Commission regarding these restrictions if he leaves the Board and if the Firm decides to pursue business with the Board.